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Making Sense of Hybrid Rights: An Analysis of the Nebraska Supreme Court's Approach to the Hybrid- Rights Exception in *Douglas County v. Anaya*

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Note*

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I. INTRODUCTION

April 17, 1990, is a day that has, or should have, tremendous significance for anyone with even a passing interest in religious liberty. On that day the Supreme Court handed down its infamous decision, *Employment Division, Department of Human Resources v. Smith*,[1] which unexpectedly and dramatically altered the degree of protection available to religious observers under the Free Exercise Clause.[2] Prior to *Smith*, the general consensus in the legal community was that even laws unintentionally burdening a claimant's right to free exercise of religion had to serve a compelling governmental interest[3] to pass constitutional muster.[4] *Smith* reversed this paradigm by charac-

1. 494 U.S. 872 (1990).
2. U.S. CONST. amend. I (providing that "Congress shall make no law . . . prohibiting the free exercise [of religion]").
3. This is the language of "strict scrutiny" review. For the specific implications of this level of judicial scrutiny, see *infra* note 20.
4. *See Smith*, 494 U.S. at 893–94 (O'Connor, J., concurring) (arguing that it was a well settled principle of free exercise jurisprudence that the government is required "to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest"); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1109–10 (1990) (noting that in the decades prior to *Smith*, the assumption that strict scrutiny universally applied to free exercise claims was regarded with approval by virtually everyone, "from the ACLU to the

terizing prior free exercise jurisprudence as actually standing for the principal that a neutral law "of general applicability need not be justified by a compelling governmental interest"[5] even where the law prohibits a person from doing something his religion demands or requires him to do something that his religion forbids.[6] While this general rule threatened to leave religious liberty vulnerable to frequent limitation, the *Smith* Court carved out a narrow exception that still left some bite in the Free Exercise Clause. Under the so-called hybrid-rights exception to *Smith*'s general rule, neutral and generally applicable laws are still subject to strict scrutiny review when they implicate not only the claimant's free exercise rights but "other constitutional protections" as well.[7] In particular, the hybrid-rights exception accommodates landmark cases in which the Supreme Court used heightened scrutiny to review laws burdening both free exercise rights and parental rights.[8]

The Nebraska Supreme Court was called upon to consider this exact combination of rights, and thus the applicability of the hybrid-rights exception, when it heard *Douglas County v. Anaya*.[9] In *Anaya*, an infant's parents refused to comply with Nebraska's mandatory metabolic testing law on the grounds that the law conflicted with their religious beliefs regarding the proper care of their child. The Nebraska Supreme Court struggled to make sense of the muddled hy-

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religious right"); *see also* Bradley P. Jacob, *Free Exercise in the "Lobbying Nineties,"* 84 NEB. L. REV. 795, 809 (2006) (explaining that "[t]o just about everyone's surprise" the *Smith* Court "jettisoned [strict scrutiny] and came up with a new regime for evaluating free exercise claims, one that was much more deferential to government interests"). Perhaps the best illustration of the dramatic shift brought about by *Smith*, is the case of *Yang v. Sturner*, 750 F. Supp. 558 (D.R.I. 1990). In *Yang*, Judge Pettine of the United States District Court for the District of Rhode Island was forced to vacate an opinion he wrote just before *Smith* was announced. Although in his prior opinion Judge Pettine had found for the religious claimants by applying strict scrutiny, he acknowledged that under *Smith*, "the compelling interest test . . . is no longer to be used when a generally applicable law affects religious conduct." *Id.* at 559. Therefore, "with deep regret," he concluded: "[T]he *Employment Division* case mandates that I recall my prior opinion." *Id.* at 558.

5. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (citing *Smith*, 494 U.S. at 879).

6. *See Smith*, 494 U.S. at 879.

7. *Id.* at 881.

8. *See* Wisconsin v. Yoder, 406 U.S. 205, 233 (1972) ("[W]hen the interests of parenthood are combined with a free exercise claim . . . *more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's [law] under the First Amendment.*" (emphasis added)); Prince v. Massachusetts, 321 U.S. 158, 165 (1944) ("The parent's conflict with the state over control of the child . . . is serious enough when only secular matters are concerned. *It becomes the more so when an element of religious conviction enters.*" (emphasis added)).

9. 269 Neb. 552, 694 N.W.2d 601, *cert. denied*, 126 S. Ct. 365 (2005) (mem.).

brid-rights concept and consequently erred in applying the exception when it held that neutral and generally applicable laws need not be subjected to strict scrutiny review, even where such laws implicate both free exercise rights and parental rights.[10] Accordingly, the court affirmed the district court's order that the Anayas immediately submit their child for the requisite metabolic testing.[11]

This Note focuses on the narrow question of what approach to hybrid-rights claims the Nebraska Supreme Court should have used to evaluate the Anayas' claim and illustrates how the proper approach would have affected the outcome in *Anaya*. Part II of this Note provides a legal background for hybrid-rights claims and an explanation of *Douglas County v. Anaya*, including the factual background and the court's holding. In Part III, this Note demonstrates that the three mainstream lower court approaches to the hybrid-rights exception are all flawed, and that the Nebraska Supreme Court erred in failing to adopt the "genuinely-implicated" approach to hybrid-rights claims.[12] Part III continues by showing that the Anayas would have obtained strict scrutiny review of Nebraska's metabolic testing law had the Nebraska Supreme Court used the genuinely-implicated approach. Finally, Part IV concludes by emphasizing that the Nebraska Supreme Court's failure to use the appropriate approach to hybrid-rights claims represents an erroneous rejection of historically significant constitutional interests that, unfortunately, will likely be repeated by other courts.

II. BACKGROUND

A. The Legal Landscape of Hybrid-Rights Claims

Before engaging in a critical analysis of the approaches that courts use to determine whether the hybrid-rights exception is applicable, it is necessary to explain the legal landscape of hybrid-rights claims in general, and of free exercise and parental rights hybrids in particular. Accordingly, the following section (1) details the textual origin of the

10. *Id.* at 557, 694 N.W.2d at 605.
11. *Id.* at 563, 694 N.W.2d at 610.
12. The "genuinely-implicated" approach is, as the name implies, an implication-based approach to hybrid-rights claims. The basis for this approach is mainly my own reading of *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); and *Prince v. Massachusetts*, 321 U.S. 158 (1944). Remarkably, upon reading *Hicks ex rel. Hicks v. Halifax County Board of Education*, 93 F. Supp. 2d 649 (E.D.N.C. 1999), I discovered that Judge Britt of the United States District Court for the Eastern District of North Carolina seems to share many of my opinions on the subject. Unfortunately, Judge Britt neglected to name or fully develop his approach to hybrid-rights claims in *Hicks*. Drawing on the language and spirit of that case, I devised the name and framework for an approach to hybrid-rights claims that I hope honors the conclusions of Judge Britt and the underlying hybrid-rights precedent.

hybrid-rights exception, (2) introduces the various ways that lower courts have applied the exception, and (3) briefly showcases the historical underpinnings of the application of heightened scrutiny to joint free exercise and parental rights claims.

1. *The* Smith *General Rule and the Origin of the Hybrid-Rights Exception*

As stated above, *Employment Division, Department of Human Resources v. Smith* forced a paradigm shift in how scholars, litigants, and judges view the Free Exercise Clause.[13] In *Smith*, the Supreme Court considered whether a state criminal law prohibiting the ingestion of peyote violated the free exercise rights of Alfred Smith and Galen Black, two members of the Native American Church.[14] Smith and Black, who were drug counselors, were fired and subsequently denied unemployment compensation after their employer discovered that they had consumed peyote during a religious ceremony.[15] In rejecting Smith and Black's assertion that strict scrutiny review applied to the case, the Supreme Court held that a "neutral law of general applicability,"[16] like Oregon's criminal proscription of peyote, need not be justified by a compelling governmental interest.[17] This has been taken to mean that only rational basis review[18] applies to neutral and generally applicable laws that happen to incidentally burden a claimant's free exercise rights.[19] Under *Smith*'s general rule, a challenge based on the Free Exercise Clause will only invoke strict scrutiny review[20]

13. *See supra* note 4 and accompanying text.
14. *See Smith*, 494 U.S. at 874.
15. *See id.*
16. *Id.* at 879.
17. *Id.* at 882.
18. Rational basis review is the lowest level of constitutional scrutiny. Under rational basis review, a challenged law will be found constitutional provided it "(1) . . . is enacted in pursuit of a legitimate governmental interest[,] and (2) . . . is reasonably related to that interest." Heather M. Good, Comment, *"The Forgotten Child of Our Constitution": The Parental Free Exercise Right to Direct the Education and Religious Upbringing of Children*, 54 EMORY L.J. 641, 644 (2005). Rational basis review is "enormously deferential" to governments, and laws very rarely fail to pass constitutional muster under this level of judicial scrutiny. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 518 (2d ed. 2002).
19. *See, e.g.*, Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 165 (3d Cir. 2002) (holding that rational basis review applies to neutral, generally applicable laws that burden religion (citing *Smith*, 494 U.S. at 879)); Miller v. Reed, 176 F.3d 1202, 1206 (9th Cir. 1999) (same).
20. Strict scrutiny is the highest level of judicial scrutiny. Under strict scrutiny, a law will be found unconstitutional *unless* the law is (1) enacted in pursuit of a compelling governmental interest and (2) narrowly tailored in achieving the asserted interest. *See* Good, *supra* note 18, at 645. Unlike rational basis review, laws reviewed with strict scrutiny are frequently declared unconstitutional, and

when the law in question is a seemingly intentional burden on religious interests.[21] Because neutrality and general applicability will only be violated by laws that fairly flagrantly discriminate against religion,[22] and because only naïve legislatures would draft such laws,[23] rational basis review is likely to apply to the majority of free exercise claims.[24]

Immediately after articulating the *Smith* general rule, the Court identified a narrow exception when it noted that

> [t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . . or the right[s] of parents.[25]

Later the Court named this exception by noting that it was not applicable in *Smith* itself, because the case did not "present such a *hybrid* situation."[26]

2. *Applying the Hybrid-Rights Exception*

Unfortunately, other than the few lines quoted above, the *Smith* Court never said much else about the hybrid-rights exception. As a result, the *Smith* Court's explanation of the hybrid-rights exception is somewhat ambiguous, making it difficult for lower courts to under-

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thus this level of scrutiny is far more protective of individual rights and liberties. *See* CHEMERINSKY, *supra* note 18, at 520.

21. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993). For an extensive analysis of this aspect of *Smith*, see Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise:* Smith, Lukumi *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 865 (2001) [hereinafter Duncan, *Long Live Free Exercise*]. Along with non-neutral laws, *Smith* held that where a public entity "has in place a system of individualized exemptions" from a law or policy, any refusal to extend an exemption in "cases of religious hardship" will be reviewed with strict scrutiny. *See Smith*, 494 U.S. at 884 (citing Bowen v. Roy, 476 U.S. 693, 708 (1986)). Professor Duncan provides a comprehensive analysis of this aspect of *Smith* as well. *See generally* Richard F. Duncan, *Free Exercise and Individualized Exemptions: Herein of* Smith, Sherbert, *Hogwarts, and Religious Liberty*, 83 NEB. L. REV. 1178 (2005).

22. *See* Duncan, *Long Live Free Exercise*, *supra* note 21, at 865 (noting that the neutrality requirement in particular will be satisfied by most laws, except those which directly discriminate against religion).

23. *See Smith*, 494 U.S. at 894 (O'Connor, J., concurring) ("[F]ew States would be so naive as to enact a law directly prohibiting or burdening a religious practice . . . .").

24. *Id.* (predicting that the *Smith* rule will have a broad sweep because prior Supreme Court "free exercise cases have *all* concerned generally applicable laws" (emphasis added)).

25. *Id.* at 881 (majority opinion) (citations omitted).

26. *Id.* at 882 (emphasis added).

stand and apply.[27] In addition to the ambiguity inherent in the *Smith* hybrid-rights passage, many debate the logic behind the exception.[28] The controversy surrounding *Smith*'s hybrid-rights passage has given rise to considerable disagreement among lower courts about whether the hybrid-rights exception exists at all, and if so, how to apply it.[29] A small minority of courts refuse to recognize the hybrid-rights exception and apply only rational basis review to cases implicating the Free Exercise Clause and a companion right.[30] In contrast, the majority of lower courts believe that *Smith* mandates strict scrutiny review whenever the hybrid-rights exception is triggered,[31] but even these courts disagree on "what a plaintiff must show to justify [the exception's] application."[32] Specifically, these courts disagree about how strong the companion claim must be in order to "hybridize" with a free exercise claim and thus trigger the exception.[33]

Despite the disagreement among courts that recognize the hybrid-rights exception, there are two key points on which these courts do agree: First, any approach to hybrid-rights claims must preserve the

27. *See* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 703 (9th Cir. 1999) (describing the *Smith* Court's explanation of the hybrid-rights exception as "cryptic"), *vacated on other grounds*, 220 F.3d 1134 (9th Cir. 2000); Swanson *ex rel.* Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 699–700 (10th Cir. 1998) (concluding that "[i]t is difficult to delineate the exact contours of the hybrid-rights theory discussed in *Smith*" and noting the resulting "difficulty of applying the *Smith* exception").

28. *See* Jacob, *supra* note 4, at 812 (describing the idea that the hybrid-rights exception leads to strict scrutiny as "an unlikely interpretation of the Supreme Court's current jurisprudence"); *see also* Grace United Methodist Church v. City of Cheyenne, 427 F.3d 775, 789 (10th Cir. 2005) (describing the hybrid-rights exception as "controversial").

29. *See Grace*, 427 F.3d at 789 (surveying the disagreement among the federal courts of appeals).

30. *See* Leebaert v. Harrington, 332 F.3d 134, 144 (2d Cir. 2003) (holding that strict scrutiny does *not* apply to hybrid-rights claims); Kissinger v. Bd. of Trs., 5 F.3d 177, 180 (6th Cir. 1993) (same).

31. *See, e.g.*, Hicks *ex rel.* Hicks v. Halifax County Bd. of Educ., 93 F. Supp. 2d 649, 662–63 (E.D.N.C. 1999) (noting that "[b]y distinguishing the hybrid-rights cases, rather than overruling them, *Smith* suggested that its general rule would not be applicable to hybrid cases" and therefore that "strict scrutiny is applicable in hybrid-rights cases"). *Accord* Civil Liberties for Urban Believers v. City of Chi., 342 F.3d 752, 764 (7th Cir. 2003) (explaining that the *Smith* Court held that successful invocations of hybrid-rights will result in strict scrutiny review of neutral and generally applicable laws); Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 165 n.26 (3d Cir. 2002) (same); *Thomas*, 165 F.3d at 711–12 (same); *Swanson*, 135 F.3d at 699–700 (same).

32. *Hicks*, 93 F. Supp. 2d at 661. *See also Thomas*, 165 F.3d at 703 ("[T]he courts of appeals have struggled to decipher *Smith*'s hybrid-rights formula and have reached divergent conclusions as to exactly what constitutes a hybrid-rights claim.").

33. *See Grace*, 427 F.3d at 789.

exception as a rare departure from the *Smith* rule.[34] Therefore, the idea that a party may trigger the exception by merely alleging a violation of free exercise rights and one other constitutional right is universally rejected.[35] Second, the most important factor in assessing the validity of an approach to hybrid-rights claims is its "consistency with Supreme Court precedent."[36]

All told, four distinct approaches to hybrid-rights claims have emerged among lower courts.[37] Because the best approach to hybrid-rights claims should contain both of the aforementioned traits, they serve as the criteria used in the critical appraisal of each approach that follows later in this Note.[38] Before undertaking this critical analysis, it is first necessary to briefly explain how each approach works.

a. The "Refusal-to-Recognize" Approach

Under this approach, the assertion that the challenged law infringes both free exercise and parental rights has no unique effect and will not result in strict scrutiny review.[39] The refusal-to-recognize ap-

34. *See, e.g.*, Littlefield v. Forney Indep. Sch. Dist., 108 F. Supp. 2d 681, 706 (N.D. Tex. 2000) ("It must be kept in mind that *Smith* is the general rule, and exceptions will not be easily found.").

35. *See, e.g.*, *Thomas*, 165 F.3d at 705 (noting that, in determining whether the hybrid-rights exception applies, courts cannot rest on the "bald assertion[s]" of the parties, because doing so would result in the hybrid-rights exception applying in virtually every free exercise case); *Swanson*, 135 F.3d at 699 (noting that, however courts decide that the hybrid-rights exception will be triggered, allowing parties to trigger the hybrid-rights exception by "simply raising such a claim" would turn the exception into "a talisman that automatically leads to the application of the compelling-interest test").

36. *Thomas*, 165 F.3d at 706. In *Thomas*, the Ninth Circuit went on to note that, in articulating or applying an approach to hybrid-rights claims, a court's job "is not to critique or to deconstruct; [but] is to make sense of a confusing doctrinal situation—*to make the pieces fit.*" *Id.* at 704 n.8 (emphasis added).

37. The names used to identify the lower court approaches to hybrid-rights claims in the following subsections are borrowed from Jonathan Hensley. In his article, Hensley identifies the "refusal-to-recognize," "independently-viable-claim," and "colorable-claim" approaches, and traces their jurisprudential origins. *See* Jonathan B. Hensley, Comment, *Approaches to the Hybrid-Rights Doctrine in Free Exercise Cases*, 68 TENN. L. REV. 119, 128–38 (2000). That article provides useful background information on the various approaches to hybrid-rights cases. Unfortunately, Hensley missed the opportunity to comment on what I call the "genuinely-implicated" approach, when he mischaracterized *Hicks ex rel. Hicks v. Halifax County Board of Education*, 93 F. Supp. 2d 649 (E.D.N.C. 1999), the major inspiration behind the genuinely-implicated standard, as a case that essentially adopted the colorable-claim approach. *See* Hensley, *supra*, at 137 (suggesting that *Hicks* adopted "the substance of [the 'colorable claim'] standard, even though it did not use the colorable claim terminology"). This conclusion is debatable. *See infra* note 78.

38. *See supra* sections III.A–B.

39. *See* Leebaert v. Harrington, 332 F.3d 134, 143 (2d Cir. 2003) ("Given our understanding of the *Smith* [hybrid-rights] statement as dicta, we are not bound, as the

proach was first used by the Sixth Circuit in *Kissinger v. Board of Trustees*,[40] when the court refused to apply the hybrid-rights exception to a student's challenge to a public university policy. In that case, the Sixth Circuit expressed its opinion that it is "completely illogical" for the level of judicial scrutiny to change depending on the number of constitutional rights at stake.[41] As a result, the court refuses to recognize the hybrid-rights exception until the Supreme Court clarifies the *Smith* hybrid-rights passage further.[42] In addition to the Sixth Circuit, the Second Circuit[43] and Missouri Supreme Court[44] have also adopted this view of the hybrid-rights passage from *Smith* and refuse to recognize the exception.

b. The "Independently-Viable-Claim" Approach

According to this approach, the hybrid-rights exception is only triggered when a free exercise claim is combined with a companion right that has been independently violated.[45] In other words, the hybrid-rights exception will not apply unless the challenged law or conduct will be found unconstitutional under the companion claim *alone*, without regard to the free exercise interests involved. Not only is this a

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First, Ninth, Tenth, and D.C. Circuits seem to perceive themselves to be, to apply some stricter standard of review than the rational basis test to hybrid claims.").

40. 5 F.3d 177 (6th Cir. 1993). Curiously, after *Kissinger*, the Sixth Circuit has been somewhat inconsistent in its treatment of the hybrid-rights exception. *Compare* Ohio Ass'n of Indep. Schs. v. Goff, 92 F.3d 419, 423 (6th Cir. 1996) ("The Supreme Court has applied strict scrutiny to such Fourteenth Amendment claims [as parental rights] where they are coupled with a challenge based on the Free Exercise Clause of the First Amendment." (citing Wisconsin v. Yoder, 406 U.S. 205, 233 (1972))), *with* Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 240 F.3d 553, 561 (6th Cir. 2001) ("[W]e do not believe the Court held [in *Smith*], nor has it ever held, that a different level of scrutiny applies to laws that potentially affect hybrid rights."), *rev'd on other grounds*, 536 U.S. 150 (2002).

41. *Kissinger*, 5 F.3d at 180.

42. *Id.* ("[A]t least until the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated, we will not use a stricter legal standard than that used in *Smith* to evaluate generally applicable, exceptionless state regulations under the Free Exercise Clause.").

43. *See Leebaert*, 332 F.3d. at 144 ("We too can think of no good reason for the standard of review to vary simply with the number of constitutional rights that the plaintiff asserts have been violated." (citing *Kissinger*, 5 F.3d at 180)).

44. *See* Blakely v. Blakely, 83 S.W.3d 537, 547–48 (Mo. 2002) (en banc) (citing *Kissinger* with approval and holding that it will not recognize the *Smith* hybrid-rights exception because "there is no logical reason to require strict scrutiny when both religious and parental control issues are considered together").

45. *See* Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 539 (1st Cir. 1995) (refusing to apply the hybrid-rights exception to plaintiffs' claims on the grounds that the plaintiffs' "free exercise challenge is . . . not conjoined with an *independently protected constitutional protection*" because the court already concluded that the challenged school policy was constitutional in light of the parents' parental rights claim by itself (emphasis added)).

difficult standard for parties to meet, but it also makes the hybrid-rights exception superfluous, since a finding that the companion claim triggers the hybrid-rights exception is made only *after* the case has effectively been resolved. In addition to the First Circuit, the District of Columbia Circuit has also adopted this approach.[46]

c. *The "Colorable-Claim" Approach*

The term "colorable," as it relates to the hybrid-rights exception, was first used by the Tenth Circuit in *Swanson ex rel. Swanson v. Guthrie Independent School District No. I-L.*[47] In that case, the Tenth Circuit noted that "[w]hatever the *Smith* hybrid-rights theory may ultimately mean, we believe that it at least requires a *colorable* showing of infringement of recognized and specific constitutional rights."[48] Essentially, this early version of the colorable-claim standard had two distinct elements: (i) there must have been a genuine infringement (ii) of recognized and specific constitutional rights. In other words, originally a "colorable claim" was one in which both "the claimed rights" and "the claimed infringements are genuine."[49]

Exactly what the Tenth Circuit meant by this language is difficult to discern and depends entirely on what the court meant by "infringement." Because "colorable" is defined as "appearing to be true,"[50] if infringement means "violation," then *Swanson* stands for the principal that the hybrid-rights exception will only apply if a claimant shows that the law at issue appears to violate the companion right. Under this first reading of *Swanson*, the exception would conceivably apply only when the law at issue is likely to be found unconstitutional under the companion claim alone.

But if "infringement" means mere "encroachment," as it appears to,[51] then the *Swanson* court's colorable-claim standard merely requires a claimant to show that the law at issue appears to encroach on the asserted companion right. Because "encroach" is synonymous with "intrude,"[52] under this second reading of *Swanson*, the hybrid-rights exception would conceivably apply if the law at issue represents

46. *See* EEOC v. Catholic Univ. of Am., 83 F.3d 455, 467 (D.C. Cir. 1996) (finding hybrid-rights exception applied because plaintiffs' free exercise claim was joined with an independent violation of the Establishment Clause).
47. 135 F.3d 694 (10th Cir. 1998).
48. *Id.* at 700 (emphasis added).
49. *Id.* at 699.
50. BLACK'S LAW DICTIONARY 282 (8th ed. 2004). *See also* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 705 (9th Cir. 1999) (defining "colorable" as "seemingly valid and genuine"), *vacated on other grounds*, 220 F.3d 1134 (9th Cir. 2000).
51. Encroachment is defined as "[a]n infringement of another's rights." BLACK'S LAW DICTIONARY 568 (8th ed. 2004).
52. *Id.*

a genuine intrusion into the companion right, leaving open the question of whether the government's intrusion violates that companion right or is justified in light of a compelling governmental interest. This colorable-claim standard would focus on weeding out utterly frivolous companion claims, rather than screening against weak ones.[53]

Unfortunately, the *Swanson* court never definitively indicated which of these two readings it had in mind. Since the companion claim at issue in *Swanson* was not a genuine assertion of recognized and specific constitutional rights,[54] the court never had reason to explain what it meant by "infringement." As a result, *Swanson* gives rise to two plausible, yet contradictory, interpretations of the colorable-claim approach. In any event, whatever the Tenth Circuit may have truly intended in *Swanson* became a moot point just one year later when the Ninth Circuit proffered its own interpretation of the colorable-claim standard in *Thomas v. Anchorage Equal Rights Commission*.[55]

In *Thomas*, the Ninth Circuit heard a novel hybrid-rights claim in which two Christian landlords, Kevin Thomas and Joyce Baker, refused to lease apartments to unmarried couples because they believed that cohabitation of unmarried individuals was sinful fornication.[56] Thomas and Baker believed that they would facilitate sin by renting to unmarried couples that planned to live together.[57] Because state and local laws prohibited discrimination in rental housing on the basis of a prospective lessee's martial status,[58] Thomas and Baker brought suit in federal court on the theory that the antidiscrimination laws were unconstitutional.[59] Alleging a hybrid-rights claim, the landloards argued that the laws at issue implicated the Free Exercise

53. Perhaps not coincidentally, in other cases decided in the same year as *Swanson* the Tenth Circuit defined a "colorable" claim in other contexts as merely a nonfrivolous claim. *See* Harline v. DEA, 148 F.3d 1199, 1203 (10th Cir. 1998) (defining a "colorable" claim as one that is not "wholly insubstantial or frivolous"); United States v. McAleer, 138 F.3d 852, 857 (10th Cir. 1998) (defining a "colorable" claim as one that has "some possible validity").

54. *Swanson*, 135 F.3d at 699 (holding that because "[t]he right to direct one's child's education does not protect" the right to pick and choose classes a child will and will not attend, plaintiffs had failed to invoke "recognized and specific constitutional rights" as a companion claim).

55. 165 F.3d 692 (9th Cir. 1999), *vacated on other grounds*, 220 F.3d 1134 (9th Cir. 2000).

56. *Id.* at 696.

57. *Id.*

58. *Id.* at 697.

59. *Id.*

Clause, the Takings Clause of the Fifth Amendment,[60] and the Free Speech Clause.[61]

Before reaching the merits of the landlords' claim, the Ninth Circuit had to determine what standard it would use to evaluate the applicability of the hybrid-rights exception. The *Thomas* court characterized *Swanson* as requiring a "colorable claim" in order to trigger the hybrid-rights exception and cited this proposition with approval.[62] The court then sought to resolve the ambiguity inherent in *Swanson*, by defining "colorable claim" more concretely. After considering the many ways in which "colorable" is used in other areas of the law, the Ninth Circuit concluded that a "colorable" companion claim is one that has "'a fair probability'—a 'likelihood'—of success on the merits."[63] Rather than arise out of the language of *Smith* or other hybrid-rights caselaw, the Ninth Circuit borrowed this test from the standard courts use to determine whether a preliminary injunction is warranted at the outset of a trial.[64]

Under the "likelihood-of-success-on-the-merits" standard, the hybrid-rights exception will not apply even if the challenged law implicates a party's free exercise and a companion right.[65] Instead, this colorable-claim approach forces a party to demonstrate that the likelihood of success on the merits of the companion claim *alone* "tips sharply" in his favor.[66] In forcing a claimant to show that the law in question likely violates the companion claim right, the *Thomas* court's version of the colorable-claim approach is consistent with the first of the two possible readings of *Swanson* sketched out above.

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60. U.S. CONST. amend. V (providing "nor shall private property be taken for public use, without just compensation"). Because the right of owners to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property," Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982), the Takings Clause is implicated whenever the government compels an owner to admit people onto his land that the owner would prefer to exclude.

61. *Thomas*, 165 F.3d at 702.

62. *Id.* at 705.

63. *Id.* at 705–06.

64. *Id.* at 706 ("Indeed, the colorable-claim standard we adopt today for evaluating hybrid-rights claims is not altogether different from the traditional 'likelihood of success on the merits' test that governs the issuance of preliminary injunctive relief.").

65. *See id.* at 705 (relying on the logic of Justice Souter's concurring opinion from Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993), to hold that "the mere fact that a companion right is 'implicated' cannot serve as the touchstone for heightened scrutiny" because "[g]overnment action will almost always 'implicate' a host of constitutional rights" and therefore, "under a permissive 'implication' standard, rarely if ever would a neutral, generally applicable law be subject to the general rule of *Smith*").

66. *Id.* at 706.

To determine whether this likelihood-of-success-on-the-merits test has been met, a court must make "difficult, qualitative, case-by-case judgments regarding the strength of [the] companion-claim[s]."[67] The *Thomas* case itself is perhaps the best example of how this analysis should unfold. There the court began its colorable-claim analysis with the plaintiffs' Takings Clause companion claim. After a lengthy discussion of the Supreme Court's takings precedent,[68] the court concluded that the claim was colorable because the plaintiffs had made a "substantial argument" that the laws at issue violated the Takings Clause.[69]

After a comprehensive analysis of the Supreme Court's free speech jurisprudence,[70] the court concluded that Thomas and Baker had alleged a colorable free speech companion claim as well. Since the antidiscrimination laws at issue specifically prohibited landlords from refusing to rent based on the lessees' marital status, the court concluded that these laws intentionally discriminated against viewpoint and were thus presumptively unconstitutional under the plaintiffs' free speech claim.[71] In sum, because the laws at issue in *Thomas* were likely to be found unconstitutional under either the takings claim or the free speech claim *by themselves*, those companion claims were both colorable, hybrid-worthy claims.

Since *Thomas*, both the Ninth and Tenth Circuit have regularly applied the likelihood-of-success-on-the-merits test as part of their colorable-claim approach to the hybrid-rights exception.[72] In addition to the Ninth and Tenth Circuits, a district court in the Third Circuit has also adopted this approach.[73]

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67. *Id.* at 705.

68. *Id.* at 707–09.

69. *Id.* at 709.

70. *Id.* at 709–11.

71. *Id.* at 711 (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992)).

72. *See, e.g.*, Grace United Methodist Church v. City of Cheyenne, 427 F.3d 775, 789 (10th Cir. 2005) (using the likelihood-of-success-on-the-merits test in deciding whether or not the hybrid-rights exception applies); San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1032 (9th Cir. 2004) (same). The original *Thomas* opinion was vacated when the Ninth Circuit, rehearing the case en banc, found that the case was not yet ripe for appellate review. Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1134 (9th Cir. 2000). Nonetheless, the vacated opinion provides a detailed explanation of the colorable-claim approach and is still an oft-cited source of guidance for both the Ninth and Tenth Circuits as they apply the colorable-claim approach in subsequent cases. *See, e.g.*, Axson-Flynn v. Johnson, 356 F.3d 1277, 1295 (10th Cir. 2004) (citing the original *Thomas* opinion for guidance in applying the colorable-claim approach); Miller v. Reed, 176 F.3d 1202, 1207 (9th Cir. 1999) (same).

73. *See* Green v. City of Phil., No. Civ.A. 03-1476, 2004 WL 1170531, at *7 (E.D. Pa. May 26, 2004).

d. The "Genuinely-Implicated" Approach

Under this approach, a claimant will successfully invoke the hybrid-rights exception only when (i) the asserted companion claim is one of three companion claims that, according to the *Smith* hybrid-rights passage, merits heightened judicial scrutiny when combined with a free exercise claim;[74] and (ii) the claimant can demonstrate that the challenged law or conduct genuinely implicates the asserted companion claim right. The second prong of this standard occupies the middle ground between, at one extreme, allowing a party to trigger the hybrid-rights exception by merely alleging a violation of the companion claim, and at the other extreme, forcing a party to show that he has at least a likelihood of prevailing on the merits of the companion claim alone.

Under an allegation-based standard, in which a court takes the claimant at his word that his companion rights are implicated by the challenged law, litigants have the power to determine if the exception applies. This is undesirable because virtually every claimant would take advantage of this fact by merely alleging a violation of hybrid-rights.[75] In contrast, an implication-based standard gives the power to the court to determine whether the exception applies.

Unlike the independently-viable-claim or colorable-claim approaches, a court using the genuinely-implicated standard need not determine whether the asserted right has been *violated*, only that it is genuinely *implicated*, as revealed by the apparent facts, evidence, and relevant law. If the court determines that the challenged law or conduct legitimately implicates both the claimant's free exercise rights and one of the companion claim rights identified in the *Smith* hybrid-rights passage, the exception applies and strict scrutiny review should follow. Whereas the *Thomas* court's colorable-claim approach is consistent with the first of the two plausible readings of the Tenth Circuit's *Swanson* opinion,[76] this standard is very similar to the second possible interpretation.

While the name and organizational framework of this approach are a product of this Note,[77] the concept behind the approach was largely inspired by *Hicks ex rel. Hicks v. Halifax County Board of Educa-*

74. These are (i) the First Amendment right to freedom of speech; (ii) the implied First Amendment right to free association; and (iii) the Fourteenth Amendment substantive due process right of parents to determine matters of custody, care, and control of their children. For the precedential support behind the limitation of hybrids-rights to these three companion claims, see *infra* notes 167–69 and accompanying text.

75. *See supra* note 35 and accompanying text.

76. *See supra* subsection II.A.2.c.

77. *See supra* note 12.

tion.[78] In that case, the court considered a grandmother's joint parental rights and free exercise challenge to a school's mandatory uniform policy. In support of the first prong of the genuinely-implicated approach, the *Hicks* court held that the hybrid-rights exception should only apply when the claimant's companion claim is one of the "constitutional interest[s] identified in [the] *Smith*[ ] hybrid-rights passage."[79] The *Hicks* court inspired the second prong of the genuinely-implicated approach when it noted that "the *Smith* Court's decision to distinguish, rather than overrule, *Yoder* suggests its belief that a statute or policy that *implicates* . . . free exercise and the parental right to direct the religious upbringing of her children, necessitates the application of heightened scrutiny."[80] The court further noted that "[w]hether or not the [companion] constitutional interest is independently viable is not at issue. It is the *mere presence* of the interest, as

78. 93 F. Supp. 2d 649 (E.D.N.C. 1999). As demonstrated by Jonathan Hensley's reading of *Hicks*, *see supra* note 37, there is room for debate as to whether *Hicks* adopted the colorable-claim approach or articulated its own approach to hybrid-rights claims. The ambiguity stems from the fact that the *Hicks* court first cited the "genuine" and "infringement" language from *Swanson*, the original colorable-claim case, *see Hicks*, 93 F. Supp. 2d at 660 n.9, then used this same "genuine" and "infringement" language in articulating its own holding. *See id.* at 662 (holding that the hybrid-rights exception will only apply when the claimant shows a "genuine claim of infringement" of specific constitutional rights). Yet the *Hicks* court never expressly announced that it was adopting the colorable-claim standard. The *Hicks* court also did not analyze the plaintiff's companion claim to determine if it alone had a likelihood of success on the merits, despite the fact that the *Hicks* court cited *Thomas*, *see id.* at 660 n.9, the case that unambiguously relied on the likelihood-of-success-on-the-merits test to evaluate the applicability of the hybrid-rights exception. The uncertainty about whether *Hicks* adopted the colorable-claim approach is undoubtedly the result of the two possible, yet contradictory, readings of the "genuine" and "infringement" language in *Swanson*. *See supra* subsection II.A.2.c. As stated, in *Thomas* the Ninth Circuit chose the first of the two plausible readings of *Swanson* and took the case to mean that a "colorable claim" must itself have a likelihood of success on the merits. *See supra* subsection II.A.2.c. The *Hicks* court appears to have adopted the second reading of the "genuine" and "infringement" language from *Swanson*, by holding that the exception applies when a claimant has a valid claim that the law in question intrudes on the companion right, without regard to the independent strength of that claim. *See Hicks*, 93 F. Supp. 2d at 662 ("Whether or not the second constitutional interest is independently viable is not at issue. It is the *mere presence* of the interest, as a *genuine claim* . . . that triggers the heightened scrutiny of the free exercise claim." (emphasis added)). Therefore, technically speaking, *Hicks* may have in fact adopted the colorable-claim approach, but only as it might have been originally understood under *Swanson*. Now that a "colorable claim" must have a likelihood of success by itself in the post-*Thomas* legal landscape, it is no longer accurate to say that *Hicks* adopted the colorable-claim approach. Instead, *Hicks*—and in my opinion, *Swanson* itself—should be read as advocating a standard that is entirely distinct from the *Thomas* court's definition of "colorable claim."

79. *Hicks*, 93 F. Supp. 2d at 662.

80. *Id.* at 661 (emphasis added).

a *genuine* claim . . . that triggers the heightened scrutiny of the free exercise claim."[81]

Because this approach did not formally exist before this Note, no court has used it by name. However, a number of courts have used a nearly identical analysis and found that the hybrid-rights exception applies when a law or policy implicates both free exercise rights and one of the companion-claim rights identified in the *Smith* hybrid-passage, seemingly without regard to the apparent strength of the companion claim.[82] Additionally, the Seventh Circuit gave favorable treatment to the idea that the hybrid-rights exception applies when the challenged law or conduct implicates both free exercise and one of the companion claims identified in *Smith*.[83]

3. *The Historical Significance of Joint Free Exercise and Parental Rights Claims*

Parental rights first gained constitutional significance in the landmark Supreme Court case *Meyer v. Nebraska*.[84] In that case, a teacher who gave a student lessons in the German language was punished under a Nebraska law that proscribed educational instruction to young children in any language other than English.[85] While it was the teacher—not the parents—who suffered criminal sanction, the case nonetheless implicated parental rights because the teacher taught German at the express request of the child's parents.[86] The Court noted that the interest of a parent in his or her child was akin to the various liberty interests already associated with the substantive component of the Due Process Clause of the Fourteenth Amendment[87]

81. *Id.* at 662 (emphasis added).

82. *See* Chalifoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659, 671 (S.D. Tex. 1997) (holding that school's policy prohibiting students from visibly displaying their rosaries triggered the hybrid-rights exception because the policy implicated both free exercise and free speech rights of the students); Alabama & Coushatta Tribes v. Big Sandy Indep. Sch. Dist., 817 F. Supp. 1319, 1332 (E.D. Tex. 1993) (applying strict scrutiny to a school district's requirement that male students wear short hair to school because the requirement implicated both free exercise and parental rights considerations, and thereby triggered the *Smith* hybrid-rights exception).

83. *See* Civil Liberties for Urban Believers v. City of Chi., 342 F.3d 752, 764 (7th Cir. 2003) ("In *Smith*, the Supreme Court noted that, in cases *implicating* the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and freedom of association, the First Amendment may subject . . . a neutral, generally applicable law to a heightened level of scrutiny." (emphasis added)).

84. 262 U.S. 390 (1923).

85. *Id.* at 397.

86. *Id.* at 400.

87. U.S. CONST. amend. XIV, § 1 (providing that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law").

and held that parents' rights also fell within the scope of that amendment.[88]

Since *Meyer*, the importance of parent's constitutionally protected liberty interest in their children has been repeatedly underscored.[89] In terms of judicial scrutiny, the majority of courts hold that parents' constitutionally protected interest in childrearing implicates only rational basis review where the parental objection is only secular in nature.[90] However, a clear line of precedent further indicates that parents' constitutionally protected interest in their children merits heightened scrutiny when parental objections are based on religious convictions.

This line of precedent began with *Prince v. Massachusetts*.[91] In *Prince*, a woman was prosecuted under a state child labor law as the guardian of a young girl who was allowed to sell religious literature on public streets. Though the Court ultimately held that state interest in protecting young children from labor outweighed the guardian's parental and religious interests at stake, it nonetheless noted that "[t]he parent's conflict with the state over control of the child and his training is serious enough when only *secular* matters are concerned. *It becomes the more so when an element of religious conviction enters.*"[92]

The idea that parental religious objections require more rigorous judicial scrutiny than merely secular parental objections was reaffirmed in *Wisconsin v. Yoder*.[93] In that case, the Supreme Court invalidated a state compulsory education law in light of an Amish parent's claim that the law conflicted with his ability to instill religious values in his children. The Court observed that where a parent challenges a law only from a secular perspective, the law is constitu-

88. *Meyer*, 262 U.S. at 400 (discussing the various liberty interests that arise from the Fourteenth Amendment and holding that "the right of parents to engage [the teacher] so to instruct their children, we think, [is] within the liberty of the amendment").

89. *See* Troxel v. Granville, 530 U.S. 57, 65 (2000) (collecting cases).

90. *See, e.g.*, Ohio Ass'n of Indep. Schs. v. Goff, 92 F.3d 419, 423 (6th Cir. 1996) (relying on Wisconsin v. Yoder, 406 U.S. 205 (1972), in holding that rational basis review applies to "wholly secular" assertions of parental rights); Herndon *ex rel.* Herndon v. Chapel Hill-Carrboro Bd. of Educ., 89 F.3d 174, 179 (4th Cir. 1996) (relying on *Yoder* in holding that, other than "when the parents' interest . . . includes a religious element, the Court has declared with equal consistency" that rational basis review applies to parental rights assertions); Immediato v. Rye Neck Sch. Dist., 73 F.3d 454, 461 (2d Cir. 1996) (applying rational basis review to parents' claim that a child's participation in high school's compulsory community service program violated their constitutional rights as parents); Littlefield v. Forney Indep. Sch. Dist., 108 F. Supp. 2d 681, 702–03 (N.D. Tex. 2000) (holding that prior Supreme Court precedent, including *Yoder*, mandates rational basis review where a parent challenges a law or policy on secular grounds).

91. 321 U.S. 158 (1944).

92. *Id.* at 165 (emphasis added).

93. 406 U.S. 205 (1972).

tional so long as it bears a reasonable relation to a valid governmental purpose, and that under such a standard the compulsory education law at issue was constitutional.[94] However, the Court held that "when the interests of parenthood are combined with a free exercise claim,"[95] the state must justify its laws with "more than merely a 'reasonable relation to some purpose within the competency of the State.'"[96] The Court found that the compulsory education law was *not* constitutional under the more rigorous judicial scrutiny required by this unique combination of rights.[97]

Finally, the extra judicial respect afforded to religiously motivated parental objections was reinforced by *Employment Division, Department of Human Resources v. Smith* itself. In *Smith*, the Court offered *Yoder* as the prime example of the principle that neutral laws of general applicability will nonetheless be subjected to rigorous judicial scrutiny when they simultaneously infringe on both free exercise and parental rights.[98] Read together, *Prince*, *Yoder*, and *Smith* strongly indicate that joint parental autonomy and free exercise claims merit heightened judicial respect.[99] It is within this legal landscape that the Nebraska Supreme Court considered a parental religious objection to Nebraska's metabolic testing law.

B. *Douglas County v. Anaya*

1. Facts

On July 11, 2003, Mary Anaya gave birth to Rosa Ariel Anaya in the Anayas' home.[100] There was no physician present at the birth and the only witness was Rosa's father, Josue Anaya.[101] The Anayas reported the birth to the Department of Health and Human Services

94. *Id.* at 233 ("[W]here nothing more than the general interest of the parent in the nurture and education of his children is involved, it is beyond dispute that the State acts 'reasonably' and constitutionally in requiring education to age 16 in some public or private school.").

95. *Id.*

96. *Id.* The "reasonable relations" language from *Yoder* is universally read as indicating rational basis review. *See supra* note 90.

97. *Yoder*, 406 U.S. at 234.

98. *See* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 881 (1990) (citing *Yoder* as an example of a parental rights and free exercise hybrid claim).

99. *See* Hicks *ex rel.* Hicks v. Halifax County Bd. of Educ., 93 F. Supp. 2d 649, 661 (E.D.N.C. 1999) ("Whatever the hybrid-rights exception may mean in other contexts," *Yoder* indicates "that a statute or policy that implicates the particular combination of rights at issue in that case, free exercise and the parental right to direct the religious upbringing of her children, necessitates the application of heightened scrutiny.").

100. Douglas County v. Anaya, 269 Neb. 552, 554, 694 N.W.2d 601, 604, *cert. denied*, 126 S. Ct. 365 (2005) (mem.).

101. *Id.*

(DHHS) on July 17.[102] On approximately August 26, 2003, the DHHS sent a letter to the Anayas informing them that they had not yet complied with Nebraska's metabolic screening law[103] and instructing them to do so.[104] In addition to the letter, the DHHS included an explanatory brochure detailing the metabolic testing process and explaining that a needle is used to extract blood from the heel of the infant.[105] In response, the Anayas sent a letter to the DHHS on September 2, 2003, indicating that they were formally refusing to submit their daughter for metabolic testing[106] because, according to their spiritual beliefs in the inherent ethereal properties of blood, any blood taken from their daughter would cause a reduction in her life span.[107]

To force the Anayas' compliance with the metabolic testing law, Douglas County filed a petition in the District Court for Douglas County, Nebraska, on September 24, 2003.[108] The Anayas responded by filing a motion for judicial exception from the metabolic testing law on the grounds that, without a religious exception, the law impermissibly infringed on their First Amendment rights to free exercise of religion and their Fourteenth Amendment rights as parents.[109] At trial, the court agreed that the Anayas' claims warranted strict scrutiny review of the compulsory metabolic testing law.[110] Nonetheless, the court found that the significance of the Anayas' beliefs did not outweigh the State's interest in protecting all of its children through early detection of metabolic disorders. Accordingly, the court concluded that the First and Fourteenth Amendments did not require Nebraska to have a judicial exception to its metabolic testing law.[111] Moreover, the court found that the Anayas' compliance with the metabolic testing law was not a moot issue simply because the requisite

102. *Id.*

103. The metabolic testing law is codified at NEB. REV. STAT. § 71-519 (Supp. 2005). It provides, in pertinent part:

> (1) All infants born in the State of Nebraska shall be screened for phenylketonuria, primary hypothryroidism, biotinidase deficiency, galactosemia, hemoglobinopathies, medium-chain acyl co-a dehydrogenase (MCAD) deficiency . . . . (2) The attending physician shall collect or cause to be collected the prescribed blood specimen . . . . If a birth is not attended by a physician and the infant does not have a physician, the person registering the birth shall cause such tests to be performed within the period and in the manner prescribed by the department.

104. Douglas County v. Anaya, No. 1030, slip op. at 1–2 (Douglas County Dist. Ct. Dec. 19, 2003).

105. *Anaya*, 269 Neb. at 554, 694 N.W.2d at 604.

106. *Anaya*, No. 1030, slip op. at 2.

107. *Anaya*, 269 Neb. at 554, 694 N.W.2d at 604.

108. *Anaya*, No. 1030, slip op. at 2.

109. *Id.* at 2–3.

110. *Id.* at 3–4.

111. *Anaya*, 269 Neb. at 555, 694 N.W.2d at 604.

forty-eight hour period had long since passed.[112] Consequently, the court ordered the Anayas to submit Rose for the requisite testing without delay.[113]

The Anayas immediately appealed the district court's decision to the Nebraska Court of Appeals. However, on January 2, 2004, Douglas County filed a Petition to Bypass with the Nebraska Supreme Court, asking the court to hear the case on direct appeal from the district court.[114] The petition was granted and the case came before the Nebraska Supreme Court for oral argument on February 3, 2005.

2. *Holding*

The Anayas' case presented three possible ways in which strict scrutiny review of Nebraska's metabolic testing law might be required: (i) as a result of the law's infringement of the Anayas' free exercise rights, without regard to other constitutional claims; (ii) as a result of the law's infringement of the Anayas' parental rights claim without regard to the religious interests involved; or (iii) as a result of the law's infringement of a combination of the Anayas' free exercise and parental rights (i.e. a hybrid-rights claim).

With respect to free exercise interests alone, the Nebraska Supreme Court stated that the relevant question was whether or not the metabolic testing law "is neutral and has general application."[115] Without much discussion, the court concluded that the law was "a neutral law of general applicability" because it "is generally applicable to all babies born in the state and does not discriminate as to which babies must be tested. Its purpose is not directed at religious practices or beliefs."[116] The court therefore held that rational basis review—not strict scrutiny—would apply to the Anayas' free exercise claim when considered independently.[117]

The next question in *Anaya* was whether or not the Anayas' Fourteenth Amendment liberty interest in parenting their child invoked strict scrutiny review of the metabolic testing law. In addressing this question, the court did not deny that the Anayas' challenge to the metabolic testing law fell within the scope of parents' constitutionally pro-

112. *Id.*

113. *Id.*

114. *See* Petition to Bypass, Douglas County v. Anaya, 269 Neb. 552, 694 N.W.2d 601 (2005) (No. A-03-001446).

115. *Anaya*, 269 Neb. at 559, 694 N.W.2d at 607.

116. *Id.* at 560, 694 N.W.2d at 608.

117. *Id.* at 561, 694 N.W.2d at 608. This Note does not take issue with the court's conclusion that the Anayas' free exercise claim *alone* does not implicate strict scrutiny, as it is clear that section 71-519 is a neutral and generally applicable law, and thus warrants only rational basis review.

tected substantive due process interest in their children.[118] Instead, the court held that the Anayas' assertion of parental rights only invoked rational basis review since "the [Supreme] Court has never held that parental rights to childrearing as guaranteed under the Due Process Clause of the 14th Amendment must be subjected to strict scrutiny."[119]

Having concluded that neither claim individually warranted strict scrutiny review, the only question remaining before the court was whether the *combination* of the Anayas' free exercise and parental interests triggered strict scrutiny review as a hybrid-rights claim. In disposing of the Anayas' hybrid-rights claim, the court held that it did

> not read *Smith* as supporting the Anayas' claim concerning strict scrutiny. Although *Smith* discussed prior decisions that involved not only the Free Exercise Clause but other constitutional provisions, the Court did not hold that a strict scrutiny review is required simply because more than one constitutional right might be implicated.[120]

The exact basis for the Nebraska Supreme Court's rejection of the Anayas' hybrid-rights claim is unclear.[121] What is clear, however, is that the court rejected the logic of the genuinely-implicated approach.

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118. This point is significant because the court could have held that the Anaya's interest as parents in this case does not even fall within the scope of parent's constitutionally protected interests in their children under the Fourteenth Amendment. *See infra* note 196.

119. *Anaya*, 269 Neb. at 559, 694 N.W.2d at 607 (citing Troxel v. Granville, 530 U.S. 57 (2000)). This Note also does not contest the court's conclusion that assertions of parental rights (without any consideration of other constitutional rights) implicate only rational basis review. In addition to requiring its own lengthy discussion, the proper level of judicial scrutiny applied to secular parental rights assertions is beyond the scope of this Note. Other scholars provide an excellent analysis of this subject. *See, e.g.*, Stephen G. Gilles, *Parental (and Grandparental) Rights After* Troxel v. Granville, 9 SUP. CT. ECON. REV. 69 (2001).

120. *Anaya*, 269 Neb. at 557, 694 N.W.2d at 605.

121. It is not clear from the court's opinion whether it was adopting the colorable-claim approach to hybrid-rights claims, or whether it was refusing to recognize the hybrid-rights exception in general. The court first noted the Tenth and Ninth Circuits' colorable-claim approach, *see id.* at 557, 694 N.W.2d at 606 (citing Miller v. Reed, 176 F.3d 1202, 1207 (9th Cir. 1999); Swanson *ex rel.* Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 700 (10th Cir. 1998)), then noted that the Sixth Circuit refuses to recognize the exception at all, *see id.* at 558, 694 N.W.2d at 606 (citing Kissinger v. Bd. of Trs., 5 F.3d 177, 180 (6th Cir. 1993)). Unfortunately, after surveying these two approaches to the hybrid-rights exception, the Nebraska Supreme Court never explicitly identified which approach it relied on in resolving the case. Moreover, the court's only explicit holding—that the hybrid-rights exception does not apply simply because more than one right might be implicated—is a proposition that the colorable-claim *and* refusal-to-recognize courts would both agree with. As a result, reasonable minds could differ about whether the court actually used the Ninth and Tenth Circuits' colorable-claim approach or instead adopted the Sixth Circuit's refusal-to-recognize approach. In the end, the exact basis for the Nebraska Supreme Court's rejection of the Anayas' hybrid-rights claim is a moot point since this Note demonstrates that the refusal-to-recognize and colorable-claim approaches are both flawed. As a final

After disposing of each of the three possible ways strict scrutiny review might apply based on the Anayas' claims, the Nebraska Supreme Court concluded that "the effect of [Nebraska's metabolic testing law] upon the constitutional claims the Anayas have asserted is properly analyzed under a rational basis review."[122] Under the rational basis test, the court held that the "State has an interest in the health and welfare of all children born in Nebraska" and because compulsory metabolic testing was reasonably related to that interest, the court held that the law "is constitutional" even without a religious exception.[123]

III. ANALYSIS

This Part demonstrates that the Nebraska Supreme Court's rejection of the genuinely-implicated approach, and resulting failure to apply strict scrutiny review to the Anayas' joint parental rights and free exercise claim, was in error. Regardless of which approach to hybrid-rights claims the Nebraska Supreme Court actually relied on, the court should have adopted the genuinely-implicated approach. Whereas alternative approaches to the hybrid-rights exception directly contradict hybrid-rights precedent, the genuinely-implicated approach aligns perfectly with the Supreme Court's hybrid-rights case law and therefore accurately reflects the logic implicit in those cases. Had the Nebraska Supreme Court adopted the genuinely-implicated approach to hybrid claims, it would have found that the Anayas' religiously grounded parental objection warranted strict scrutiny review of Nebraska's metabolic testing law.

A. The Three Mainstream Approaches to the Hybrid-Rights Exception are Inherently Flawed

As noted earlier, the federal courts of appeals employ three distinct approaches to the hybrid-rights exception: (a) the refusal-to-recognize approach, (b) the independently-viable-claim approach, and (c) the col-

matter, the confusion inherent in the court's opinion is undoubtedly a direct result of the fact the hybrid-rights exception is a "confusing doctrinal situation," Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 704 (9th Cir. 1999), *vacated on other grounds*, 220 F.3d 1134 (9th Cir. 2000). The ambiguity of the *Smith* opinion itself, *see supra* note 27 and accompanying text, is compounded by the divergent conclusions of the federal courts of appeals, *see supra* notes 29, 32 and accompanying text. The result is that courts freshly entering the hybrid-rights fray—like the Nebraska Supreme Court—are charged with the near-impossible task of making sense of this mess. If this Note does not help foster a consensus on the correct approach to hybrid-rights claims, my hope is that it will at least help practitioners, courts, and commentators understand the debate more clearly.

122. *Anaya*, 269 Neb. at 561, 694 N.W.2d at 608.

123. *Id.*

orable-claim approach.[124] The following subsections will demonstrate that each of those approaches is fundamentally flawed and therefore unfit for use in determining whether the hybrid-rights exception applies to any given case.

1. *The Refusal-to-Recognize Approach Ignores Binding Precedent and Contradicts the Conclusions of the Majority of Jurisdictions*

The first major problem with the refusal-to-recognize approach is that it fails to adequately reconcile the holdings in *Wisconsin v. Yoder* and *Employment Division, Department of Human Resources v. Smith*. If refusal-to-recognize courts accept *Smith*'s general rule that neutral laws of general applicability receive only rational basis review[125] then they cannot logically explain *Yoder*, a case in which the Supreme Court applied strict scrutiny[126] to a law that was neutral and generally applicable.[127] Because *Smith* did not overrule *Yoder*,[128] courts have only two options in reconciling these two cases: (i) refuse to recognize both the hybrid-rights exception *and* the *Smith* general rule, thus explaining *Yoder* as consistent with the principle that even incidental burdens to religious exercise warrant strict scrutiny; or (ii) accept the *Smith* general rule and acknowledge that *Yoder* stands for the hybrid-rights exception.

The first option is impossible because it requires a rejection of clearly articulated Supreme Court precedent.[129] Thus the second option, recognizing both the *Smith* rule and the hybrid-rights exception, is the only tenable combined reading of *Smith* and *Yoder*. If courts simply adopt *Smith*'s characterization of the Free Exercise Clause but reject the hybrid-rights exception, then it is impossible to explain the outcome in *Yoder*.[130]

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124. *See supra* subsections II.A.2.a–c.
125. *See supra* note 19 and accompanying text.
126. The *Yoder* Court required Wisconsin to show more than "merely a 'reasonable relation to some competency within the state'" to justify the compulsory education law at issue. *See* Wisconsin v. Yoder, 406 U.S. 205, 233 (1972). This language from *Yoder* is universally regarded as referring to strict scrutiny review. *See, e.g.*, Ohio Ass'n of Indep. Schs. v. Goff, 92 F.3d 419, 423 (6th Cir. 1996) (citing *Yoder*, 406 U.S. at 233).
127. *See Yoder*, 406 U.S. at 219–20 (indicating that Wisconsin's compulsory education, in being applied equally to every child in Wisconsin, is "neutral on its face" and of "general applicability").
128. Hicks *ex rel.* Hicks v. Halifax County Bd. of Educ., 93 F. Supp. 2d 649, 661 (E.D.N.C. 1999) (noting that the *Smith* court chose to "distinguish, rather than overrule, *Yoder*").
129. *Smith* undeniably rejects the idea that strict scrutiny applies to neutral and generally applicable laws. *See supra* notes 17, 19 and accompanying text.
130. *See* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 704 (9th Cir. 1999) ("Although undoubtedly the path of least resistance, there is a salient prob-

Because *Smith* preserved *Yoder*,[131] and because Supreme Court holdings are binding until the Court expressly overrules them,[132] lower courts must accept *Smith's* characterization of *Yoder* and thereby apply its hybrid-rights concept,[133] even if they disagree with its logic.[134] Therefore, until the Supreme Court expressly changes its interpretation of the Free Exercise Clause, lower courts have the duty "to give meaning to the seemingly impenetrable hybrid-rights exception by applying the law to the facts before it."[135] The refusal-to-recognize approach is flawed because it ignores this principle.

The second major problem with the refusal-to-recognize approach is that it runs counter to the conclusions reached by the overwhelming majority of courts that have considered the issue. Ten of the thirteen federal circuits have directly considered whether the hybrid-rights exception exists.[136] Of those ten circuits, eight have held that when

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lem with the Sixth Circuit's decision to simply throw up its hands in despair: *Smith* did not overrule . . . *Yoder*; it distinguished [it]."), *vacated on other grounds*, 220 F.3d 1134 (9th Cir. 2000); Hensley, *supra* note 37, at 139 ("[I]gnoring hybrid-rights means also ignoring the fact that the Court distinguished *Yoder*.").

131. *See supra* notes 128, 130 and accompanying text.

132. *See* Agostini v. Felton, 521 U.S. 203, 207 (1997) ("[L]ower courts should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

133. *See* Wisconsin v. Yoder, 406 U.S. 205, 233 (1972) ("[W]hen the interests of parenthood are combined with a free exercise claim . . . *more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's [law] under the First Amendment.*" (emphasis added)); *see also* Prince v. Massachusetts, 321 U.S. 158, 165 (1944) ("The parent's conflict with the state over control of the child . . . is serious enough when only secular matters are concerned. *It becomes the more so when an element of religious conviction enters.*" (emphasis added)).

134. *See* cases cited *supra* notes 41, 43–44.

135. *Hicks*, 93 F. Supp. 2d at 661. *See also* Duncan, *Long Live Free Exercise*, *supra* note 21, at 858 ("[R]egardless of the intellectual merits of the hybrid theory, it is still law until the [Supreme] Court holds otherwise."). At least one prominent scholar believes "that the notion of 'hybrid' claims was created for the sole purpose of distinguishing *Yoder*" rather than overruling it in *Smith*, McConnell, *supra* note 4, at 1121, probably because a majority of Justices would not have voted to overrule *Yoder*. But even if the hybrid-rights exception truly is nothing more than a jurisprudential gymnastic created for the sole purpose of allowing the *Smith* majority to get around *Yoder*, that does not diminish the fact that it is a gymnastic lower courts are compelled to apply in earnest.

136. As of the writing of this Note, the Eleventh and Federal Circuits have not addressed the issue, nor have any district courts in those circuits. While the Fifth Circuit itself has yet to consider hybrid rights, several district courts in the Fifth Circuit have addressed the issue with somewhat mixed results. *Compare* Alabama & Coushatta Tribes v. Big Sandy Indep. Sch. Dist., 817 F. Supp. 1319, 1332 (E.D. Tex. 1993) (applying strict scrutiny to a school district's requirement that male students wear short hair to school, because the requirement implicated both free exercise and parental rights considerations, thereby triggering the *Smith* hybrid-rights exception), *with* Littlefield v. Forney Indep. Sch. Dist., 108 F. Supp.

properly invoked, the hybrid-rights exception does result in strict scrutiny review of the law in question.[137] The results are even more dramatic at the state level, where appellate courts or supreme courts from fourteen states have addressed the hybrid-rights question.[138] Of those states, only one explicitly refuses to apply the exception.[139] The remaining thirteen states all acknowledge the *Smith* hybrid-rights exception and hold that when it is triggered, strict scrutiny applies.[140]

2d 681, 706 (N.D. Tex. 2000) (referring to litigant's combinations of free exercise and parental rights claims as "bootstrapping" and declining to find a hybrid-rights exception outside the narrow situation presented by *Yoder*), *aff'd on other grounds*, 268 F.3d 275 (5th Cir. 2001).

137. *See* San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1032 (9th Cir. 2004) (holding that the hybrid-rights exception requires strict scrutiny review, but finding that no hybrid-rights were implicated in the instant case because the plaintiff had failed to assert a "colorable claim" of violations of free exercise and one other constitutional right); Axson-Flynn v. Johnson, 356 F.3d 1277, 1297 (10th Cir. 2004) (citing the Ninth Circuit's colorable-claim requirement for hybrids with approval, and remanding back to trial court for more factual inquires, so that the validity of plaintiff's hybrid claim could be determined); Civil Liberties for Urban Believers v. City of Chi., 342 F.3d 752, 764–65 (7th Cir. 2003) (holding that the *Smith* hybrid-rights exception warrants strict scrutiny but declining to apply the exception in the particular case because the plaintiffs' companion claims were "meritless"); Reich v. Shiloh True Light Church of Christ, No. 95-2765, 1996 WL 228802, at *3 (4th Cir. May 7, 1996) (per curiam) (acknowledging the hybrid-rights exception from *Smith* and noting, with approval, the district court's application of strict scrutiny to the combination of a hybrid free exercise and parental rights claim); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 467 (D.C. Cir. 1996) (holding that case presented a hybrid-rights situation, mandating strict scrutiny); Brown v. Hot, Sexy, & Safer Prods., Inc., 68 F.3d 525, 539 (1st Cir. 1995) (acknowledging the existence of the *Smith* hybrid-rights exception but finding that child's compulsory attendance at school assembly did not implicate a parent's substantive due process rights and therefore that the case was not one where hybrid-rights were implicated); Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 473 (8th Cir. 1991) (citing the district court's dismissal of plaintiff's hybrid-rights claim with disapproval, and ordering the district court to consider plaintiff's hybrid-rights claim on remand); Salvation Army v. Dep't of County Affairs, 919 F.2d 183, 197 (3d Cir. 1990) (acknowledging the existence of the hybrid-rights exception from *Smith* but remanding back to trial court for more proceedings on the question of whether plaintiffs raised a valid freedom of association claim).

138. This figure excludes *Douglas County v. Anaya*, 269 Neb. 552, 694 N.W.2d 601, *cert. denied*, 126 S. Ct. 365 (2005) (mem.), the Nebraska Supreme Court case at issue in this Note.

139. *See* Blakely v. Blakely, 83 S.W.3d 537, 548 (Mo. 2002) (citing Kissinger v. Board of Trustees, 5 F.3d 177 (6th Cir. 1993), with approval and holding that it will not recognize the *Smith* hybrid-rights exception because "there is no logical reason to require strict scrutiny when both religious and parental control issues are considered together").

140. *See* Thomas v. Anchorage Equal Rights Comm'n, 102 P.3d 937, 940–44 (Alaska 2004) (acknowledging the *Smith* hybrid-rights exception, but finding that the particular facts failed to raise a valid companion claim in addition to free exercise rights); Roman Catholic Archbishop of L.A. v. Superior Court, 32 Cal. Rptr. 3d 209, 223–24 (Ct. App. 2005) (same); City Chapel Evangelical Free, Inc. v. City of

The fact that nearly every court to consider the issue has found that the exception is law on at least some level is strong evidence that the refusal-to-recognize courts are in error. This fact, and the fact that the refusal-to-recognize approach to hybrid claims fails to adequately reconcile *Smith* and *Yoder*, both make it clear that it is an inappropriate approach to the hybrid-rights exception.

2. *The Independently-Viable-Claim Approach Contradicts Hybrid-Rights Precedent*

Under the independently-viable-claim approach, the hybrid-rights exception applies only when a party combines a free exercise claim with a companion claim that, by itself, would result in a finding that the challenged law is unconstitutional.[141] Because parties with independently viable companion claims would prevail on the companion claim alone, this approach renders the hybrid-rights exception super-

South Bend, 744 N.E.2d 443, 454 (Ind. 2002) (citing as error the trial court's denial of a hearing on the merits of the plaintiff's hybrid-rights claim and remanding back to trial court on these grounds); People v. DeJonge, 501 N.W.2d 127, 134–35 (Mich. 1993) (invalidating a state's home school certification requirement on the grounds that the designation impacted free exercise and parental rights and failed to withstand the strict scrutiny mandated by the hybrid-rights exception); Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857, 862–63 (Minn. 1992) (acknowledging that the hybrid-rights exception from *Smith* mandates the use of strict scrutiny, but finding that the particular case did not present a hybrid-rights claim); Valley Christian Sch. v. Montana High Sch. Ass'n, 86 P.3d 554, 559–60 (Mont. 2004) (same); South Jersey Catholic Sch. Teachers Ass'n v. St. Teresa of the Infant Jesus Church Elementary Sch., 696 A.2d 709, 721–22 (N.J. 1997) (acknowledging the hybrid-rights exception from *Smith*, but finding the exception inapplicable to the present case because the challenged regulation did not implicate parental rights); Health Servs. Div., Health & Env't Dep't v. Temple Baptist Church, 814 P.2d 130, 135–36 (N.M. Ct. App. 1991) (acknowledging that the *Smith* hybrid-rights exception mandates strict scrutiny, but finding that no companion constitutional claim was implicated on the particular facts); N.Y. Employment Relations Bd. v. Christ the King Reg'l High Sch., 682 N.E.2d 960, 964 (N.Y. 1997) (same); Church at 295 S. 18th St. v. Employment Dep't, 28 P.3d 1185, 1192–93 (Or. Ct. App. 2001) (same); Scott v. State, 80 S.W.3d 184, 193 (Tex. App. 2002) (holding that without religious exception, testimonial oath requirement was unconstitutional as it failed to withstand the strict scrutiny mandated by the *Smith* hybrid exception, since the requirement implicated both free exercise and free speech rights); State v. DeLaBruere, 577 A.2d 254, 261 (Vt. 1990) (holding that state anti-truancy law, which punished parents for sending child to non-certified religious school, triggered strict scrutiny review when it implicated a hybrid-rights claim of free exercise and parental rights); First Covenant Church of Seattle, 840 P.2d 174, 181–82 (Wash. 1992) (invalidating city's designation of a church as a landmark on the grounds that the designation implicated the hybrid-rights of the church and failed to withstand the strict scrutiny that follows when the hybrid-rights exception is triggered).

141. *See supra* subsection II.A.2.b.

fluous.[142] By eliminating the utility of the hybrid-rights exception, the independently-viable-claim approach fails to explain the outcome in *Wisconsin v. Yoder*. Recall that in *Yoder*, the Court explicitly noted that under the parental rights claim *alone*, the compulsory education law at issue was constitutional.[143] But despite the fact that the parental rights claim alone was not independently viable, the Court applied heightened scrutiny anyway, because the case presented a unique combination of parental and religious interests.[144] Without the parents' free exercise interests at stake, *Yoder* would undoubtedly have been resolved in favor of the state.[145] As stated earlier, above all else, the legitimacy of an approach to hybrid-rights claims depends entirely on its consistency with underlying hybrid-rights precedent.[146] Because the independently-viable-claim approach ignores the significance of the mere combination of interests at issue in *Yoder*, it contra-

142. In *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004), the Tenth Circuit stated that

> it makes no sense to adopt a strict standard that essentially requires a *successful* companion claim because such a test would make the free exercise claim unnecessary. If the plaintiff's additional constitutional claim is successful, he or she would typically not need the free exercise claim and the hybrid-rights exception would add nothing to the case.

Id. at 1297. Similarly, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), Justice Souter commented in his concurring opinion that

> if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law, under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls hybrid cases to have mentioned the Free Exercise Clause at all.

Id. at 567 (Souter, J. concurring). *See also* Hensley, *supra* note 37, at 131–32 (noting that the cases relying on the "independently viable claim" approach "demonstrate[ ] the problem of requiring an independent claim to trigger the hybrid-rights exception" because in finding that the challenged law violates the companion claim anyway, "there seems to be no reason for the court to [bring] up the hybrid-rights doctrine at all").

143. *See* Wisconsin v. Yoder, 406 U.S. 205, 233 (1972) ("[W]here nothing more than the general interest of the parent . . . is involved, it is *beyond dispute* that the State acts 'reasonably' and constitutionally in requiring education to age 16 in some public or private school meeting the standards prescribed by the State." (emphasis added)).

144. *See id.* ("[W]hen the interests of parenthood are *combined* with a free exercise claim of the nature revealed by this record, *more than* merely a 'reasonable relation to some purpose within the competency of the State' is required." (emphasis added)).

145. *See* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 704 (9th Cir. 1999) ("[R]epeated references to the Free Exercise Clause in the so-called hybrid cases [*Yoder* and *Cantwell*] leave us with little doubt that, whatever else it did, the Court did *not* rest its decisions in those cases upon the recognition of independently viable free speech and substantive due process rights."), *vacated on other grounds*, 220 F.3d 1134 (9th Cir. 2000).

146. *See supra* note 36 and accompanying text.

dicts that case and is therefore an inappropriate method to assess the applicability of the hybrid-rights exception.

3. *The Colorable-Claim Approach also Contradicts Hybrid-Rights Precedent*

Under the colorable-claim approach, the hybrid-rights exception only applies when the claimant can show that the companion claim alone has a likelihood of success on the merits.[147] By making the applicability of the hybrid-rights exception depend entirely on the likelihood of success of the companion claim in isolation, the colorable-claim approach suffers from the same problem as the independently-viable-claim approach: it directly contradicts *Wisconsin v. Yoder*.

In *Yoder*, the Supreme Court unambiguously stated that under the Amish parent's parental rights claim by itself—which invoked only rational basis review—the law in question was valid.[148] In other words, independent of any other constitutional interests, the parental rights claim raised in *Yoder* was anything but colorable (at least as the Ninth and Tenth Circuits now define "colorable").[149] Nevertheless, the Court applied strict scrutiny because it concluded that when "the interests of parenthood are combined with a free exercise claim," the state had to justify its compulsory education law with something "more than merely a 'reasonable relation to some purpose within the competency of the state.'"[150]

Because the compulsory education law at issue in *Yoder* was neutral and generally applicable,[151] under the *Smith* Court's characterization of the Free Exercise Clause, strict scrutiny was not triggered by the Amish parent's free exercise interests alone.[152] *Smith* acknowledges this by explaining *Yoder* as a hybrid-rights exception from its

147. *See supra* text accompanying note 63.

148. *See Yoder*, 406 U.S. at 233 (stating that Wisconsin's compulsory education law is constitutional under only rational basis review, because "it is beyond dispute that the state acts '*reasonably*' . . . in requiring education to age 16 in some public or private school meeting the standards prescribed by the State" (emphasis added)).

149. Under the current colorable-claim standard used by the Ninth and Tenth Circuits, whether the hybrid-rights exception applies depends on the independent strength of the companion claims alone. *See supra* text accompanying notes 63, 65–67, 72. But in *Yoder*, "the parents' right to direct the upbringing of their children presumably would not have had any force were it divorced from the free exercise aspects of the parents' claims." Hicks *ex rel.* Hicks v. Halifax County Bd. of Educ., 93 F. Supp. 2d 649, 662 (E.D.N.C. 1999).

150. *Yoder*, 406 U.S. at 233.

151. *See supra* note 127.

152. *See* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 882 (1990) (noting that the Supreme Court's Free Exercise Clause jurisprudence reflects the principle that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability'" (citing United States v. Lee, 455 U.S. 252, 263 n.3 (1982))).

general rule.[153] But if the companion claim at issue in *Yoder* was not colorable, then the Court must have employed something other than the colorable-claim standard in deciding that the conjunctive interests at stake warranted strict scrutiny review of a neutral, generally applicable law. Hence, while some proponents of the colorable claim approach are quick to boast that the approach explains exactly why *Smith* itself was *not* a hybrid-rights case,[154] they fail to notice that the colorable-claim approach cannot explain why *Yoder* was.

The Ninth and Tenth Circuits use the colorable-claim approach primarily because they believe that it more effectively limits the number of exceptions from *Smith*'s general rule than any alternative approach to hybrid-rights claims.[155] While this is a reasonable objective,

153. *See Smith*, 494 U.S. at 881 ("The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action, have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as . . . the right[s] of parents." (citing *Yoder*, 406 U.S. at 233)).

154. In *Smith*, the Supreme Court stated that "[t]he present case does *not* present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right." *Smith*, 494 U.S. at 882 (emphasis added). In first articulating the colorable-claim approach, the Ninth Circuit took considerable glee in the fact that, while a less stringent approach to hybrid claims might fail to explain why *Smith* itself was not deemed a hybrid case, "the colorable claim standard we adopt engenders no such problem." Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 706 (9th Cir. 1999), *vacated on other grounds*, 220 F.3d 1134 (9th Cir. 2000). The Ninth Circuit believed that *Smith* would not have been a hybrid case under the colorable-claim approach because under the Supreme Court's free speech jurisprudence, generally applicable laws that have merely an incidental effect of regulating expressive conduct are only subject to rational basis review. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 576–77 (1991) (Scalia, J., concurring) (noting that, where expressive conduct is regulated by a neutral law that was not enacted with the purpose to proscribe expressive conduct specifically for its communicative value, the law in question need not pass "normal First Amendment scrutiny" (i.e. strict scrutiny), nor even be "justified by an 'important or substantial' government interest" (i.e. intermediate scrutiny)). Because Smith's ingestion of peyote was "at best" only "expressive conduct," *Thomas*, 165 F.3d at 706, and because the Oregon law banning peyote consumption was clearly not enacted to proscribe peyote use for its communicative value, *see id.*, a freedom of speech companion claim in *Smith* would have invoked only rational basis review. Because rational basis review has a low likelihood of success on the merits, *see supra* note 18, the Ninth Circuit happily noted that "[t]he plaintiffs in *Smith* could not have made out a 'colorable claim of infringement' with respect to their free speech rights." *Id.*

155. *See* Axson-Flynn v. Johnson, 356 F.3d 1277, 1295 (10th Cir. 2004) (noting with approval that use of the colorable-claim approach helps prevent an opening of "the floodgates for hybrid-rights claims" that less stringent approaches would invite); *Thomas*, 165 F.3d at 705 (holding that "the mere fact that a companion right is 'implicated' cannot serve as the touchstone for heightened scrutiny" because "under a permissive 'implication' standard, rarely if ever would a neutral, generally applicable law be subject to the general rule in *Smith*" and thus there would be frequent exceptions from *Smith*'s general rule).

it should not come at the expense of conformity with hybrid-rights precedent. As the Ninth Circuit has said itself, "any hybrid rule's administrability must play second fiddle to its *consistency with Supreme Court precedent.*"[156] Therefore, because the colorable-claim approach contradicts *Yoder*, the Supreme Court's quintessential hybrid-rights case, it too is an inappropriate approach to hybrid-rights claims.

B. Courts Should Use the Genuinely-Implicated Standard when Evaluating the Applicability of the Hybrid-Rights Exception

Since the three mainstream lower court approaches to the hybrid-rights exception are demonstrably flawed, the next question is what approach courts—including the Nebraska Supreme Court—should use instead. This section illustrates that only an implication-based standard, like the genuinely-implicated approach, preserves the hybrid-rights exception as a narrow departure from the *Smith* general rule in a manner that is consistent with hybrid-rights case law. Accordingly, it is the superior method to determine whether the hybrid-rights exception applies to a particular case.

1. *The Genuinely-Implicated Approach Best Reflects the Implicit Logic of the Hybrid-Rights Cases*

In contrast to the mainstream lower court approaches, there are two distinct ways in which the genuinely-implicated approach harmonizes with relevant case law. First, unlike the independently-viable-claim or colorable-claim approaches, which predicate the hybrid-rights exception on a calculation of the success of the companion claim alone, the genuinely-implicated approach reflects the principle that it is merely the conjunction of free exercise and select companion claim rights "in and of itself, [that] merits heightened scrutiny."[157]

In *Prince v. Massachusetts*, the Court noted that parental objections to state action required heightened judicial scrutiny simply when "an element of religious conviction *enters*."[158] Similarly, in *Yoder*, the Court noted that a law must withstand heightened judicial scrutiny when "the interests of parenthood are *combined* with a free exercise claim."[159] Finally, in *Smith* itself the Court noted that the exception to the *Smith* rule is triggered when claims have involved "the Free Exercise Clause in *conjunction* with other constitutional pro-

156. *Thomas*, 165 F.3d at 706 (emphasis added).
157. Hicks *ex rel.* Hicks v. Halifax County Bd. of Educ., 93 F. Supp. 2d 649, 662 (E.D.N.C. 1999).
158. 321 U.S. 158, 165 (1944) (emphasis added).
159. Wisconsin v. Yoder, 406 U.S. 205, 233 (1972) (emphasis added).

tections . . . such as . . . the right of parents."[160] Taken together, the "enters," "combined," and "conjunction" language from *Prince*, *Yoder*, and *Smith* reflect the idea that "it is the mere presence of the interest, as a genuine claim . . . that triggers the heightened scrutiny of the free exercise claim."[161]

Because *Wisconsin v. Yoder*, the charter hybrid-rights case, was not resolved based on the strength of the companion claim alone,[162] "whether or not the second constitutional interest is independently viable is not at issue."[163] Thus, it does not make sense to make the applicability of the hybrid-rights exception depend on whether the companion claim has a certitude or even a likelihood of success by itself. Rather, the language and logic of *Prince*, *Yoder*, and *Smith* suggest that the hybrid-rights analysis applies when a law merely *implicates* a claimant's free exercise right and one of the select companion claim rights.[164] Other courts seem to have reached this conclusion also, and describe the *Smith* hybrid-rights exception using "implication" terms.[165] It should thus be clear that only an implication-based standard is consistent with the language, logic, and outcome in *Yoder* and *Smith*.

The second way in which the genuinely-implicated approach remains true to the spirit of underlying hybrid-rights case law is by limiting potential companion claims to only those that the *Smith* Court identified as requiring special significance when combined with a religious interest.[166] These rights are (i) the freedom of speech and of

160. *See* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 882 (1990) (emphasis added).

161. *Hicks*, 93 F. Supp. 2d at 662.

162. *See supra* subsections III.A.2–3.

163. *Hicks*, 93 F. Supp. 2d at 662.

164. *Id.* at 661 (emphasis added).

165. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 513–14 (1997) (using *Yoder* as an example of a hybrid-rights case and noting that the case "*implicated* not only the right to the free exercise of religion but also the right of parents to control their children's education" (emphasis added)); Civil Liberties for Urban Believers v. City of Chi., 342 F.3d 752, 764 (7th Cir. 2003) ("In *Smith*, the Supreme Court noted that, in cases *implicating* the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and freedom of association, the First Amendment may subject . . . a neutral, generally applicable law to a heightened level of scrutiny." (emphasis added)); *see also* cases cited *supra* note 82. Even the Tenth Circuit, in the course of announcing the original colorable-claim standard, could not avoiding using "implication" language to describe the hybrid-rights exception. *See* Swanson *ex rel.* Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 699 (10th Cir. 1998) (noting that in *Smith*, "the Supreme Court noted the difference between cases solely involving the Free Exercise Clause and those *implicating* other constitutional protections, such as the parental right to direct the education of children" (emphasis added)).

166. *See Hicks*, 93 F. Supp. 2d at 662 (holding that, under its view, the permissible companion claims successfully triggering the hybrid-rights exception should be

the press;[167] (ii) the right of parents to direct the care, custody, and control of their children;[168] and (iii) the freedom of association.[169] Other than these three specific rights, the *Smith* court did not suggest that any other rights warranted special judicial significance when combined with religious interests.[170] Therefore, any legitimate approach to evaluating hybrid-rights claims must also be limited to only these three companion claims.[171] Among the various approaches to hybrid-rights claims, only the genuinely-implicated standard takes this into account.

2. *The Genuinely-Implicated Approach Preserves the Hybrid-Rights Exception as a Rare Departure from the* Smith *General Rule*

In his concurring opinion in *Church of the Lukumi Babablu Aye, Inc. v. City of Hialeah*,[172] a free exercise case before the Supreme Court three years after *Smith*, Justice Souter took occasion to criticize the *Smith* majority opinion in general and the hybrid-rights exception in particular. In that opinion, Justice Souter described an implica-

limited to one of the "constitutional interest[s] identified in *Smith's* hybrid rights passage").

167. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 881 (1990) (identifying one hybrid-worthy companion claim as the assertion of free exercise rights "in conjunction with other constitutional protections, such as freedom of speech and of the press," and citing Cantwell v. Connecticut, 310 U.S. 296 (1940); Murdock v. Pennsylvania, 319 U.S. 105 (1943); and Follett v. McCormick, 321 U.S. 573 (1944), as examples of cases where religiously motivated expression was given heightened judicial deference).

168. *Smith*, 494 U.S. at 881 (identifying another hybrid-worthy companion claim as "the right of parents to direct the education of their children" and citing Wisconsin v. Yoder, 406 U.S. 510 (1972), as an example).

169. *Smith*, 494 U.S. at 882 (identifying the last hybrid-worthy companion claim as the freedom of association by noting that "it is easy to envision a case in which a challenge on *freedom of association* grounds would likewise be reinforced by Free Exercise Clause concerns" (emphasis added) (citing Roberts v. U.S. Jaycees, 468 U.S. 609 (1984))).

170. Nor is the limitation of hybrid-rights to these three interests an arbitrary determination. The ability to express beliefs, congregate with others, and instill values in children are all pursuits that take on a critical significance for adherents of religious faiths. After all, what is religion if not the communal expression of faith across generations? Therefore, to say that expression, congregation, and child-drearing are activities of "Biblical" significance is no understatement.

171. While subsequent case law could theoretically expand on the list of hybrid-worthy companion rights, lower courts should avoid doing so. The *Smith* Court was careful to limit the hybrid-rights exception to situations in which Supreme Court case law had applied unique deference to a right when that right was combined with religious interests. For example, the special significance afforded to joint parental rights and free exercise claims has been repeated for roughly sixty years. *See supra* subsection II.A.3. Therefore, the Supreme Court should lead the way in expanding the list of hybrid-worthy companion claims.

172. 508 U.S. 520 (1993).

tion-based approach to applying the hybrid-rights exception as "ultimately untenable."[173] Because an argument can be made that "[g]overnment action will almost always implicate a host of constitutional rights,"[174] Justice Souter opined that under an implication-based standard, the hybrid-rights exception would apply in nearly every case, thereby swallowing the *Smith* rule.[175] He concluded his criticism of an implication-based approach to the hybrid-rights exception by asking why the exception did not apply in *Smith* itself, since "free speech . . . rights are certainly implicated by the peyote ritual."[176]

Two responses to Justice Souter's assertions are in order. First, there are several reasons to dispute Justice Souter's belief that *Smith* itself should have been a hybrid-rights case if the *Smith* majority intended an implication-based approach to hybrid claims. Perhaps the most obvious reason why *Smith* itself was not a hybrid-rights case is simply because it wasn't pled or argued that way.[177] This is an important fact that even Justice Souter does not deny.[178]

But even if *Smith* had been litigated on hybrid-rights grounds, the case still would not have triggered the hybrid-rights exception under an implication-based approach. Ingesting peyote during a private religious ceremony does not implicate First Amendment free speech rights under the test established in *Texas v. Johnson*,[179] a landmark free speech case in which the Supreme Court considered the constitutionality of laws prohibiting flag burning.

Since burning a flag is not strictly verbal speech, the *Johnson* Court had to determine when expressive conduct implicates the First Amendment. The Court began its analysis by noting that, read literally, the First Amendment prohibits abridgment of "speech" in the traditional sense: the written or spoken word.[180] In contrast to verbal speech, expressive conduct does not automatically implicate the First

173. *Id.* at 567 (Souter, J., concurring).
174. Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 705 (9th Cir. 1999), *vacated on other grounds*, 220 F.3d 1134 (9th Cir. 2000).
175. *Lukumi*, 508 U.S. at 567 (Souter, J., concurring).
176. *Id. See also Thomas*, 165 F.3d at 706 ("Under an implication standard, the claims raised in *Smith* would themselves have been within the scope of the hybrid-rights exception . . . .") .
177. *See* Duncan, *Long Live Free Exercise*, *supra* note 21, at 859 (noting that the Court did not address why *Smith* was not a hybrid case "only because the case was decided without briefing or argument on this (as yet) undiscovered First Amendment concept").
178. *See Lukumi*, 508 U.S. at 571–72 (Souter, J., concurring) (explaining that "the *Smith* rule was not subject to a 'full-dress argument'" because neither party was prepared for the Court's re-characterization of free exercise jurisprudence and both parties assumed strict scrutiny applied).
179. 491 U.S. 397 (1989).
180. *Id.* at 404.

Amendment. The Court held that conduct only "possesses sufficient communicative elements" to implicate the First Amendment if "[a]n intent to convey a particularized message [is] present" and there was a strong likelihood "that the message would have been understood by those who viewed it."[181] Like burning a flag, ingesting peyote during a Native American ritual is "certainly not 'speech' in the traditional sense"; at best it is only "expressive conduct."[182] Accordingly, peyote consumption must be accompanied by an intent to convey a particularized message that would have been readily understood by viewers before it implicates free speech rights. In *Johnson*, the Court listed several examples of when such an intent existed.[183] Notably, in each of the cases the Court cited, the conduct at issue clearly operated as a (i) public expression (ii) of the actor's dissent from the mainstream view (iii) on a significant political or social topic.[184] These three elements appear to be the telltale indicia of when the intent to convey a particularized message is present and will be understood by viewers.

Because the plaintiffs in *Smith* consumed peyote during a private religious ceremony[185] where they were most likely surrounded only by like-minded believers, their conduct lacks at least two of these three elements. Therefore, the conduct at issue in *Smith* can be distinguished from the wearing of anti-war armbands in protest of the Vietnam War, as in *Tinker v. Des Moines Independent Community School District*;[186] African-Americans sitting in a "whites only" section of a library to protest segregation, as in *Brown v. Louisiana*;[187] or burning an American flag outside a political convention to express displeasure with a nominee's policies, as in *Johnson*. As a result, even if the claimants in *Smith* had thought to litigate on free exercise *and* free speech grounds, they would have been unable to demonstrate that

181. *See id.* at 405 (quoting Spence v. Washington, 418 U.S. 405, 410–11 (1974)).
182. Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 706 (9th Cir. 1999), *vacated on other grounds*, 220 F.3d 1134 (9th Cir. 2000).
183. *Johnson*, 491 U.S. at 404 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 US. 503 (1969); Brown v. Louisiana, 383 U.S. 131 (1966); Schact v. United States, 398 U.S. 58 (1970); Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); United States v. Grace, 461 U.S. 171 (1983)).
184. *See, e.g.*, *Tinker*, 393 U.S. at 505 (holding that free speech rights are implicated by the expressive conduct of students who wore black armbands in protest of American involvement in the Vietnam conflict); *Brown*, 383 U.S. at 141–42 (1966) (holding that free speech rights are implicated by the expressive conduct of African-Americans who conducted a "sit-in" in protest of racial segregation). In *Texas v. Johnson* itself, Johnson burned a flag during the Republican Party's renomination of Ronald Reagan for President. The Court held that the "expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent." *Johnson*, 491 U.S. at 406.
185. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 874 (1990).
186. 393 U.S. 503 (1969).
187. 383 U.S. 131 (1966).

they ingested peyote with an intent to convey a particularized message of the unpopular, public, and politicized nature necessary for expressive conduct to implicate First Amendment free speech rights.

The result may well have been different if, for example, the plaintiffs in *Smith* had been arrested for ingesting peyote on the steps of Oregon's capitol building during a protest against the legislature's ban on the drug. Had that been the case, such conduct may have implicated free speech rights. But under the facts of the actual case, viewed in light of the Court's free speech jurisprudence, the *Smith* majority was right to conclude that the case "does not present such a hybrid situation, but a free exercise claim *unconnected with any communicative activity*."[188] Therefore, under an implication-based approach, *Smith* was resolved exactly as it should have been.

Justice Souter's second argument—that an implication-based approach to hybrid-rights claims would force courts to apply the exception in nearly every free-exercise case—is similarly flawed. In fact, the genuinely-implicated approach limits the frequency of exceptions from the *Smith* general rule in two distinct ways. First, by restricting the hybrid-rights exception to only those cases in which the companion claim asserted is one of the three companion claims specifically mentioned in *Smith*'s hybrid-rights passage,[189] the first prong of the genuinely-implicated standard calls for courts to reject claims where the companion right asserted is not one of the three unique claims cited as significant in *Smith*[190] or is simply an imaginary right.[191] Ironically, even courts adopting more stringent approaches to hybrid-rights claims in hopes of reducing the number of exceptions from *Smith*'s general rule[192] never bothered to consider that perhaps the exception should be limited to the three unique companion rights listed in *Smith* and not opened up to *any* possible companion right.

Second, the genuinely-implicated approach limits the hybrid-rights exception by allowing courts to reject hybrid claims when the plaintiff fails to provide evidence that the challenged law or official conduct adversely impacts, and therefore genuinely implicates, the asserted companion right. Accordingly, courts using this standard would easily reject frivolous attempts to invoke the hybrid-rights exception in cases

188. *Smith*, 494 U.S. at 882 (emphasis added).

189. *See supra* text accompanying notes 167–69.

190. *See, e.g.*, Green v. City of Phil., No. Civ.A. 03-1476, 2004 WL 1170531, at *7 (rejecting a hybrid-rights assertion that relied on the Second Amendment right to bear arms as the companion claim).

191. *See, e.g.*, Miller v. Reed, 176 F.3d 1202, 1208 (9th Cir. 1999) (rejecting a hybrid-rights assertion that relied on the "non-existent claim of a 'right to drive'" as the companion claim).

192. *See supra* note 155.

where the facts make clear that the asserted companion claim is not genuinely implicated by the law or official conduct in question.[193]

In sum, the genuinely-implicated approach is just as effective as the alternative approaches in ensuring that only legitimate companion claims trigger the hybrid-rights exception.[194] However, unlike the colorable-claim approach, the genuinely-implicated approach limits the applicability of the hybrid-rights exception in a manner that more accurately reflects the logic inherent in the Supreme Court's hybrid-rights jurisprudence. Accordingly, the genuinely-implicated approach is the superior method for evaluating assertions of hybrid-rights.

C. The Anayas Raised a Valid Hybrid-Rights Claim Under the Genuinely-Implicated Approach

Having demonstrated that the genuinely-implicated approach is the superior standard to evaluate the applicability of the hybrid-rights exception, the only remaining question is whether the Anayas would have triggered the hybrid-rights exception had the Nebraska Supreme Court used the genuinely-implicated approach in *Douglas County v. Anaya*. Under the first prong of the genuinely-implicated approach, a party must assert a violation of one of the three unique companion claims identified in the *Smith* hybrid-rights passage[195] in addition to a free exercise claim. The Anayas have satisfied the first prong of the genuinely-implicated approach by objecting to Nebraska's metabolic testing law on the grounds that the law violates their Fourteenth Amendment substantive due process right to parental autonomy in childrearing.[196]

193. *See, e.g.*, Grace United Methodist Church v. City of Cheyenne, 427 F.3d 775, 790 (10th Cir. 2005) (holding that the hybrid-rights exception was not applicable because the church's free speech rights were not implicated, since the land use laws at issue "were unrelated to expression," and there was no evidence that "the zoning regulations affected the ability of the Church members to speak, assemble, or associate with one another"); San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1032 (9th Cir. 2004) (rejecting a Christian college's assertion of hybrid-rights, in part, on the grounds that the city's zoning law at issue did not implicate the college's freedom of speech rights, because the argument that the prohibited building *itself* is a form of speech, is meritless); Swanson *ex rel.* Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694, 699–700 (10th Cir. 1998) (declining to apply hybrid-rights exception to parents' religiously motivated objection to district's home schooling policy, on the grounds that the right to "pick and choose" which classes their child attends does not implicate parents' Fourteenth Amendment substantive due process rights to direct their child's education).

194. Note that in the cases cited *supra* notes 190–91 and 193, the presiding courts all purported to use the colorable-claim approach. Yet the genuinely-implicated approach would have rejected these frivolous claims just as efficiently as the courts actually hearing those cases did.

195. *See supra* text accompnaying notes 167–69.

196. *See* Douglas County v. Anaya, 269 Neb. 552, 554, 694 N.W.2d 601, 604, *cert. denied*, 126 S. Ct. 365 (2005) (mem.). An argument could have been raised as to

The second prong requires a party to demonstrate that Nebraska's metabolic testing law genuinely implicates their parental rights. As a threshold matter, the Anayas' sincerity in their belief that a loss of blood will reduce the lifespan of their child was never called into question.[197] Undoubtedly, the State's attempts to subject the Anayas' child to metabolic testing against their wishes implicates the Anayas' constitutionally protected liberty interest in their child. The letters sent by state officials and court orders commanding the Anayas to immediately comply with Nebraska's metabolic testing law[198] are evidence that the Anayas' parental rights have been implicated. Accordingly, the Anayas have satisfied both prongs of the genuinely-implicated approach and would have successfully invoked the *Smith* hybrid-rights exception had the Nebraska Supreme Court used this approach to hybrid-rights claims. As a result, their joint free exercise and parental rights claim warranted strict scrutiny review of Nebraska's metabolic testing law.[199]

IV. CONCLUSION

The Nebraska Supreme Court erred in applying the *Smith* hybrid-rights exception when it failed to use the genuinely-implicated approach in *Douglas County v. Anaya*. In contrast to the alternatives, the genuinely-implicated approach not only preserves the hybrid-rights doctrine as a narrow exception, but also stays true to the logic and result in the *Prince*, *Yoder*, and *Smith* trio of landmark hybrid-

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whether a parent's objection to state compulsory medical procedures is within the scope of a parent's Fourteenth Amendment liberty interest in his or her children. *See* Boone v. Boozman, 217 F. Supp. 2d 938, 955 (E.D. Ark. 2002) (noting that "the key characteristic of [the prior Supreme Court hybrid-rights] cases is that they relate to educational instruction" and thus a parent's challenge to a vaccination law falls outside the scope of the Fourteenth Amendment, precluding consideration of such a case as a hybrid claim). While that argument has its flaws, it is not necessary to address them here because, as noted earlier, the Nebraska Supreme Court never denied that the Anayas' parental rights claim fell within the scope of parents' Fourteenth Amendment substantive due process interests in their children. *See supra* text accompanying note 118. Accordingly, the point is moot as far as both the Anayas' case and this Note are concerned.

197. Douglas County v. Anaya, No. 1030, slip op. at 1–2 (Douglas County Dist. Ct. Dec. 19, 2003).

198. *See supra* text accompanying notes 103–05, 108, 113.

199. Intentionally absent from this Note's analysis is a discussion of whether the Anayas would have prevailed had the Nebraska Supreme Court reviewed the metabolic testing law with strict scrutiny. I deliberately omit such a discussion because it is irrelevant. Whether or not the use of strict scrutiny would have made a difference in *Anaya*, the point of this Note is to illustrate that *Anaya* has established erroneous precedent that is at odds with the Supreme Court's case law in this area. By drawing attention to the Nebraska Supreme Court's analysis in *Anaya*, my intent is to affect hybrid-rights litigation on the whole, not just the particular hybrid-rights case at issue here.

rights cases. Had the Nebraska Supreme Court used this approach to hybrid-rights claims, it would have concluded that Nebraska's metabolic testing law genuinely implicates both the Anayas' Free Exercise Clause rights and Fourteenth Amendment rights as parents. Accordingly, the court would have reviewed Nebraska's metabolic testing law with strict scrutiny.

In failing to use the appropriate approach to evaluate the applicability of the hybrid-rights exception, *Anaya* is a stalwart rejection of the heightened judicial respect traditionally afforded to joint free exercise and parental rights claims. *Prince*, *Yoder*, and *Smith* would force the state to show a compelling interest to justify simultaneous infringements on parental rights and free exercise interests. But under *Anaya*, the state need only show a reasonable relation to a "legitimate" legislative interest, even when a law implicates a claimant's free exercise and parental rights. Whereas *Prince*, *Yoder*, and *Smith* demand that governments exercise the utmost caution in imposing a burden on parents' autonomy in raising children according to their religious beliefs, *Anaya* allows the State to use all but the most extreme degree of capriciousness in doing so.

Unfortunately, other courts are likely to repeat the Nebraska Supreme Court's mistake and similarly deny heightened judicial respect to historically significant constitutional interests. As illustrated by the divergent conclusions of the federal courts of appeals,[200] and the ambiguous nature of the *Anaya* opinion itself,[201] the hybrid-rights exception is a confusing mess of contradictory interpretations and vague holdings. Consequently, it is easy for courts to misapply. Until lower courts return to the charter hybrid-rights cases and thereby recognize that the hybrid-rights exception does exist and that only an implication-based approach is valid, legitimate hybrid-rights claims will be consistently denied in the years to come.

Ultimately, only the Supreme Court can definitively resolve the questions of whether the hybrid-rights exception exists, and if so, when it applies. Unfortunately, it has been over a decade since the Supreme Court even mentioned the hybrid-rights exception,[202] and the Court has shown an unwillingness to review hybrid-rights cases.[203] Thus, it may be a long time—if ever—before concrete an-

200. *See supra* subsections II.A.2.a–d.

201. *See supra* note 121.

202. As of the writing of this Note, it has been sixteen years since the hybrid-rights exception was announced in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990). Other than a brief reference in a subsequent Supreme Court free exercise case, *see* City of Boerne v. Flores, 521 U.S. 507, 513–14 (1997), the Court has not mentioned the hybrid-rights exception.

203. After losing at the Nebraska Supreme Court, the Anayas appealed to the United States Supreme Court. *See* Petition for Writ of Certiorari, Anaya v. Douglas County, 126 S. Ct. 365 (2005) (No. 04-1718), 2005 WL 1467344. Unfortunately,

swers are forthcoming. Until then, courts must make the most of what they have available by dutifully applying the exception in light of both *Smith* and the underlying hybrid-rights precedent.

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only three justices voted to grant certiorari at the initial certiorari conference, and the appeal died when the possible fourth vote, the newly confirmed Chief Justice John Roberts, declined to participate in the certiorari decision. *See* Anaya v. Douglas County, 126 S. Ct. 365 (mem.), *denying cert. to* 269 Neb. 552, 694 N.W.2d 601 (2005).